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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHRISTINE A.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

ST. JOSEPH HOSPITAL OF ORANGE,

Real Party in Interest.

G042458

(Super. Ct. No. 06CC12868)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Peter J. Polos, Judge. Petition granted.

Law Offices of Barry Novack, Barry B. Novack and Jonathan Parrott for Petitioner.

No appearance for Respondent.

Horvitz & Levy, S. Thomas Todd, H. Thomas Watson; Beam, Brobeck, West, Borges & Rosa, John E. West and Susan D. Garbutt for Real Party in Interest.

Cole Pedroza, Curtis A. Cole and Cassidy E. Cole for California Medical Association, California Dental Association and California Hospital Association; Law Offices of Kenneth W. Drake & Associates, Inc., Kenneth W. Drake and Kenneth R. Myers for Community Hospital of Los Gatos-Saratoga, Desert Regional Medical Center, Doctors Hospital of Manteca, Doctors Medical Center of Modesto, Encino-Tarzana Regional Medical Center, Fountain Valley Regional Hospital and Medical Center, Irvine Regional Hospital and Medical Center, John F. Kennedy Memorial Hospital, Lakewood Regional Medical Center, Los Alamitos Medical Center, Placentia-Linda Hospital, San Ramon Regional Medical Center, Sierra Vista Regional Medical Center, Sierra Vista Regional Medical Center, and Twin Cities Community Hospital as Amici Curiae on behalf of Real Party in Interest.

* * *

Petitioner Christine A. filed a lawsuit against St. Joseph Hospital of Orange (St. Joseph or the hospital) and Sheldon Nadler, alleging that Nadler, an X-ray technician, sexually battered her while performing X-rays. In addition to suing St. Joseph for negligence, Christine also alleged a cause of action under Civil Code section 51.9 (section 51.9), which creates liability for sexual harassment in the context of certain business and professional relationships that are not easily terminated. The trial court granted summary adjudication to the hospital on this claim on the grounds that the statute did not apply to the relationship between Christine and Nadler, and even if it did, it was

easy to terminate. Christine petitioned for extraordinary relief. Because we find that both issues set forth by the trial court as grounds for granting the motion are triable issues of fact, the hospital's motion should not have been granted. We also reject the issues raised for the first time on appeal as not being proper grounds on which to grant the motion. We therefore grant Christine's petition.

I

FACTS AND PROCEDURAL BACKGROUND

On May 8, 2006, Christine went to St. Joseph for an X-ray study prescribed by her gastroenterologist. She had been taking medication for seven days prior, to assist with the visibility of certain features on the X-ray. Because of the preparation required, she felt it was important to get the study done that day. Nadler, who was certified and licensed by the state to conduct X-rays and fluoroscopic procedures, was assigned to conduct the X-ray on Christine.

She changed into a hospital gown before the procedure. After some initial questions, Christine lay down on the X-ray table. Nadler then touched Christine on her breasts and vaginal area several times. Christine initially thought this was part of the procedure, but became uncomfortable and realized the touching was inappropriate. She later testified that she felt scared, which was why she did not immediately leave or report Nadler's actions. She also felt that she had to get the test completed. Nadler then took the film and left the room for a minute or two.

When Nadler returned, he approached Christine and caressed her arm. While purporting to explain something about the X-ray, Nadler engaged in what Christine described as "groping." He told her that he did not get the X-ray, which prevented her from leaving. He then took another X-ray and touched Christine again on the X-ray table, and yet again while he was looking at the films. She attempted to move

away from Nadler, but did not confront him verbally. She dressed and left as quickly as possible.

Christine's allegations against Nadler were not unique. Four days prior to the incident with Christine, another patient, Jeanette M., alleged similar behavior.[1] Jeanette was finished with a chest X-ray when Nadler came up behind her, cupped his hands underneath her breasts, lifted each one, and asked which one hurt. She was scared, shocked and embarrassed, and quickly dressed and left. Jeanette's husband contacted St. Joseph the same day and reported what had happened. A form apparently produced by the hospital documented this complaint, including the fact that Jeanette's breasts were touched in a way that made her feel uncomfortable.

In prior employment at Hoag Hospital, Nadler had also been accused of sexual harassment. In 1997, he was accused of tripping on purpose in order to touch the breast of a coworker, making her "extremely uncomfortable and angry." He was also accused of greeting the same coworker with statements such as "Hello Beautiful" and "Hello Sexy" and offensive visual contact. His behavior was characterized by Hoag management as "offensive and unprofessional." On a later date, Nadler was disciplined for improperly "holding" a female patient during an X-ray procedure, in violation of regulations and safety protocols.

While at St. Joseph, Nadler's personnel file shows a handwritten note reflecting that in 2005, he was spoken to regarding a coworker's complaints of unwanted physical contact. The coworker testified that Nadler put his arm around her and on her shoulder in a way that made her feel uncomfortable.

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[1] Jeanette was originally a plaintiff in a consolidated action, but her case settled before this petition was filed.

A memo in 2006 documented an incident in which a patient who had come in for a chest X-ray complained that Nadler walked in on her in the changing room while she was undressed. She reported that Nadler told her "You're beautiful." Nadler denied making the comment and claimed he had knocked before entering, and no one had answered. Both the manager and the director of the radiology department knew about these complaints prior to the incidents with Jeanette and Christine.

Christine's lawsuit alleged claims against Nadler for sexual battery, intentional infliction of emotional distress, and negligence. Against St. Joseph, she alleged a separate claim for negligence, and against both Nadler and the hospital, she alleged the violation of section 51.9. As part of her section 51.9 claim, Christine alleged she was entitled to punitive damages and attorney fees.

In May 2009, St. Joseph moved for summary adjudication of Christine's cause of action under section 51.9. The hospital argued that Christine could not establish that she and Nadler had the type of professional or business relationship covered by the statute, and that even if they did, she could have easily terminated the relationship. After briefing and oral argument, the court granted the motion. Christine sought writ relief and we issued an alternative writ and order to show cause along with an order to stay further proceedings.

II

DISCUSSION

Standard of Review

"'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie

case . . . ." [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." [Citations.]' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) "[W]e '"liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

Section 51.9

Section 51.9, which was enacted in 1994, states: "(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements: [¶] (1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons: [¶] (A) Physician, psychotherapist, or dentist. For purposes of this section, 'psychotherapist' has the same meaning as set forth in paragraph (1) of subdivision (c) of Section 728 of the Business and Professions Code. [¶] (B) Attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer. [¶] (C) Executor, trustee, or administrator. [¶] (D) Landlord or property manager. [¶] (E) Teacher. [¶] (F) A relationship that is substantially similar to any of the above. [¶] (2) The defendant has made sexual advances, solicitations, sexual requests, demands for

sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe. [¶] (3) There is an inability by the plaintiff to easily terminate the relationship. [¶] (4) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2). [¶] (b) In an action pursuant to this section, damages shall be awarded as provided by subdivision (b) of Section 52. [¶] (c) Nothing in this section shall be construed to limit application of any other remedies or rights provided under the law. [¶] (d) The definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a cause of action brought under this section."[2]

"The uncodified provision of Senate Bill No. 612, section 1, states, 'The Legislature finds and declares that sexual harassment occurs not only in the workplace, but in relationships between providers of professional services and their clients.' The Legislative Counsel's Digest for Senate Bill No. 612 states: 'Existing law makes it unlawful to harass an employee or employment applicant because of, among other things, sex. These provisions are enforced by the Department of Fair Employment and Housing. General provisions of existing law specify that all persons have the right to be free from violence or intimidation by threat of violence, against their persons or property, because of certain bases of discrimination. [¶] This bill would provide a cause of action for sexual harassment that occurs as part of a professional relationship, as specified.'

[2] The hospital requests we take judicial notice of the legislative history of section 51.9. Pursuant to Evidence Code sections 452, 453 and 459, the request is granted.

[Citation.]" (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1105-1106 (*C.R.*).)

In the summary adjudication proceeding below, St. Joseph argued that Christine could not establish two necessary elements for a claim under the statute: 1) the existence of a qualifying "business, service, or professional relationship" under the statute; and 2) Christine was not unable to "easily terminate" the relationship within the meaning of the statute. For the first time in this proceeding, St. Joseph also argues a third element — that the harassment was not "pervasive or severe" under the statute. Also for the first time, St. Joseph also argues that a legal entity such as a hospital cannot be liable under section 51.9, and that it cannot be vicariously liable for the acts of its employees under the statute. We first address the corporate and vicarious liability contentions, and then move on to discussing the elements of the statute.

Corporate and Vicarious Liability

It is rarely proper for an appellate court, whether in an action for extraordinary relief or on appeal, to address issues that have not been raised in the court below. "Only when the issue presented involves purely a legal question, on an *uncontroverted record and requires no factual determinations*, is it appropriate to address new theories. [Citations.]" (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal. App.4th 820, 847.) We therefore address one issue St. Joseph's has raised for the first time, and decline to address the other.

The question of corporate liability under section 51.9 was addressed by the court in *C.R.*: "Defendant argues that because it is a business, as opposed to an individual, it cannot be liable for the sexual abuse of plaintiff. Defendant relies on the language in section 51.9, subdivision (a) which states '[a] person is liable' for sexual

harassment. Thus, defendant argues, because it is a corporation, it cannot be liable under the provisions of section 51.9 for sexual abuse. This contention has no merit. [Civil Code] Section 14 states in part, '[T]he word person includes a corporation as well as natural person . . . .' [Citations.] None of the Assembly and Senate committee reports we have discussed previously in this opinion support the conclusion that the Legislature intended to hold a natural person liable for sexual harassment in the context of 'business, service, or professional' relationships which often involve corporations. [Citations.] Thus, a corporation may be civilly liable for violating section 51.9." (*C.R.*, *supra*, 169 Cal.App.4th at p. 1110.)

We agree, and are unpersuaded by the hospital's arguments that *C.R.* was simply wrongly decided. In addition to that precedent, the language of the statute contemplates applying the statute to entities other than individuals because it includes "collection service" in the list of "persons" who could be held liable. (§ 51.9, subd. (a)(1)(B).) If some form of business entity could be held liable as a "collection service," it would fly in the face of logic to hold that corporations can never be held liable under the statute. As the Legislative Counsel's Digest noted, "This bill would provide a cause of action for sexual harassment that occurs as part of a professional relationship, as specified." (Legis. Counsel's Dig., Sen. Bill No. 612 (1993-1994 Reg. Sess.) 5 Stats. 1994, Summary Dig., p. 271.) Professional relationships do not only occur between individuals, but between individuals and business entities, and accordingly, should be interpreted in a manner similar to similar statutes which also apply to business entities. It would not serve the purposes of the statute to hold only individuals liable under the statute, regardless of the particular circumstances of the case.

With respect to the issue of vicarious liability, this court cannot address it at this time. "[A] private corporation is generally liable under the doctrine of respondeat

superior for torts of its agents or employees committed while they are acting within the scope of their employment . . . ." (*Von Beltz v. Stuntman, Inc.* (1989) 207 Cal.App.3d 1467, 1488.) "[A]n employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 (*Lisa M.*).)

While torts such as sexual assault are often outside the scope of employment, this issue "is a question of fact unless '"the facts are undisputed and *no conflicting inferences are possible*."' [Citations.]" (*Lisa M., supra,* 12 Cal.4th at p. 312.) We do not know if the pertinent facts in this case are undisputed, because this issue was not raised in the motion for summary adjudication, and the key facts, therefore, were not included in the separate statement. Therefore, it is premature for this court to opine on this question, and as such, it cannot be a basis upon which the trial court's decision to grant summary adjudication may be upheld.[3]

A "Substantially Similar" Relationship

As noted above, section 51.9 sets forth a list of 20 business, service or professional providers (providers) to whom the statute applies, and then goes on to include: "A relationship that is substantially similar to any of the above." The hospital and amici believe we should decide that an X-ray technician cannot be included in this list as a matter of law, but based on the language of the statute, we believe that whether

[3] To the extent that either amici or the hospital argues that section 51.9 preempts traditional precepts of vicarious liability and respondeat superior as a matter of law, we reject those contentions. Had the Legislature intended such a result, it would be reflected in the plain language of the statute.

Nadler is a person in a relationship "substantially similar" presents a question of material fact for the finder of fact.

It is clear from the language of section 51.9 that the statute was intended to protect potential victims from sexual harassment during the course of certain "business, service, or professional relationship[s]." The Legislature enumerated certain providers to whom the statute applied, but did not make that list exclusive. Instead, it was inclusive rather than exclusive, and specifically states that those in a relationship "substantially similar" to those listed should be included.

Few cases thus far have interpreted this provision. In *C.R.*, the court addressed the question of whether a certified nurse assistant could have a relationship within the meaning of the statute. "*Depending on the fact*s, a certified nurse assistant can have a service or professional relationship with a patient, as can other hospital staff. It depends on the facts." (*C.R., supra*, 169 Cal.App.4th at p. 1106, italics added.)

We agree with the *C.R.* court that whether a relationship is "substantially similar" is a factual determination, and we are not persuaded by the facts set forth in the hospital's motion and separate statement that this issue can simply be decided as a matter of law. At one level, it is easy to distinguish a doctor from an X-ray technician — a doctor provides a diagnosis and decides on a course of care. A doctor has an advanced degree and interprets tests such as X-rays, while a technician performs the test. St. Joseph points to these and similar facts in its separate statement to support its position that as a matter of law, a doctor and an X-ray technician cannot be in a relationship with the patient that is "substantially similar."

But facts must also be considered. A doctor, like an X-ray technician, may not be chosen by the patient in the case of managed care or emergency care. A doctor and an X-ray technician both provide needed, sometimes urgently required, services. A

doctor, like an X-ray technician, might only provide services on a single occasion. Both a doctor and an X-ray technician may encounter a patient when the patient is particularly vulnerable, often in a weakened condition, based on his or her state of mind and the type of illness being treated or diagnosed. A doctor's exam can be brief, and so can an X-ray. A doctor might examine the patient while clothed, partially clothed or unclothed, just as an X-ray technician might perform X-ray studies on a patient in any state of dress or undress. And just as a patient expects a doctor will perform an exam and reach an accurate diagnosis, the patient also expects that an X-ray technician will properly use radiology equipment.[4]

On some level it is easy to see what makes a doctor and an X-ray technician different, but it is also rather easy to see what makes them similar. We therefore cannot, on this record, hold that an X-ray technician can never be in a "substantially similar" relationship with a patient as a doctor, dentist, master's in social work, or the other providers listed in the statute. What each of the providers has in common is a measure of authority or power, however temporary, over a potential victim, and in the case of some of the providers, the potential victim has little choice in selecting that provider, in at least some circumstances. Thus, attempting to devise certain categories of providers that are always included or always excluded from the statute's ambit would, in our view, be unwise and fail to serve the statute's purpose of preventing sexual harassment in business, professional and service relationships. It is, in all but the most clear-cut of cases, a triable issue of fact. This is not that case, and therefore, summary adjudication should not have been granted on this ground.

[4] Although the hospital implies that performing X-rays is a merely ministerial task, it is a job that requires significant education and certification.

Inability to "Easily Terminate" the Relationship

Even more than the question of whether a relationship qualifies under subdivision (a)(1) of section 51.9, the question of whether that relationship can be "easily terminate[d]" under subdivision (a)(3) is not readily susceptible to summary adjudication. St. Joseph argues, without authority, that the statute should not be construed to include the ability to terminate the harassing encounter itself, but only the overall relationship. In the context of a relationship such as the one at issue here, these issues are not easily separable. The relationship was defined by the encounter, and there is more than sufficient evidence to establish that Christine did not terminate the relationship or the encounter because she was frightened, and because she strongly felt that she needed to complete the X-ray procedure on that particular day. This is sufficient to create a triable issue of fact on the question of whether the relationship was easy to terminate.

We also reject the hospital's argument that Christine could terminate the relationship by "walking out of the X-ray room through an unlocked door and never returning." It is overly simplistic and lacks analysis with regard to the physical condition and mindset of someone who is in any threatening situation, particularly an ongoing sexual assault. While St. Joseph may feel that "Nadler did not perform a service that was the least bit unique; it was a ministerial service that other X-ray technicians could just as easily have performed" there is no evidence that Christine knew that at the time. The evidence only demonstrated that she was "scared" when Nadler touched her sexually, and believed that she "could not terminate the relationship without jeopardizing her health." Triable issues of fact exist as to whether the relationship was easy to terminate, and therefore this was an improper basis upon which to grant summary adjudication. (*Lyle v. Warner Brothers Television Productions*, *supra*, 38 Cal.4th at p. 274.)

Pervasive or Severe

Under subdivision (a)(2) of section 51.9, sexual harassment must be "pervasive or severe" to set forth a cause of action under the statute. For the first time in this proceeding, St. Joseph appears to make the argument that only forcible rape can constitute "severe" conduct under sexual harassment law. As we discussed *ante*, it is improper for this court to decide issues not raised in the trial court except in rare circumstances (*Mattco Forge, Inc. v. Arthur Young & Co., supra,* 52 Cal.App.4th at p. 847) and we find those circumstances are not present here.

To the extent the hospital is asking this court to conclude that as a matter of law, "severe" conduct in the context of a single incident of sexual harassment requires forcible rape, we decline to do so. While the published cases mostly involve rape, there are no cases specifically holding that rape is required, and the absence of authority on a certain point is not authority itself. Further, the language of the case law does not suggest that forcible rape is required. Indeed, in a recent California Supreme Court case interpreting the "pervasive or severe" prong of section 51.9, the court stated that an "isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a *physical* assault or the threat thereof.' [Citation.]" (*Hughes v. Pair, supra,* 46 Cal.4th at p. 1049.)[5] A "physical assault" is not the equivalent of rape, and we decline to read in

[5] In *Hughes v. Pair*, the court did uphold summary judgment on the issue of whether the harassment was "pervasive or severe." In that case, however, there was no allegation of an actual physical assault. The harassment in that case consisted only of "comments defendant made to plaintiff during a single telephone conversation and a brief statement defendant made to plaintiff in person later that day during a social event . . . ." (*Hughes v. Pair, supra,* 46 Cal.4th at p. 1048.) thus it was not "pervasive" within the meaning of the statute because the harassment consisted of isolated incidents. (*Ibid.*) The harassment was not "severe" because it did not consist of a physical assault or the threat thereof. (*Id.* at p. 1049.)

such a meaning. Christine was, indeed, subject to unwanted touching, which is a physical assault under any definition of the term.

If a physical assault may, under appropriate circumstances, constitute "severe" conduct, then as an issue that was not developed in the trial court, it is inappropriate for us to opine further. St. Joseph has not established that Christine cannot set forth a prima facie case on this point, and therefore, the court would not have been justified in granting summary adjudication on this issue.

III

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing the superior court to vacate its order granting summary adjudication on Christine's section 51.9 cause of action and issue a new order denying summary adjudication. The stay on further proceedings is dissolved. Christine shall recover her costs.

MOORE, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.